said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." The tenant had moved out. The Illinois court puts the case upon the basis of a bilateral contract with dependent promises. No reference is made in the opinion to *Chicago Legal News Co.* v. *Browne,* 103 Ill. 317, wherein it was held that the rent obligation had not ceased upon the breach by the landlord of an agreement not to lease adjoining premises for saloon purposes. In the last mentioned case it did not appear that the tenant had moved out, but no reliance seems to have been put upon that fact. Cases of the type under consideration, it seems, should not be made to turn upon the giving up of possession, for properly they are not cases of eviction, but of general contract law. If the conclusion from the terms of the lease be that the parties intended the agreements to be dependent and there has been a breach of the landlord's undertaking, the tenant should not be held liable whether he has remained in possession or moved out. Remaining in possession despite the breach by the landlord may be important as evidence to show a waiver, but certainly it ought not to be conclusive on that point.

The *Deakin* case may also be open to the criticism that the landlord had not really broken its covenant. The premises were demised to Deakin to be used for a jewelry and art shop and for no other purpose. The lessor covenanted with reference to leasing other parts of the building as stated above. Another room in the building was leased to one Sandberg with a covenant on his part that the premises leased should not be used "for a collateral loan or pawnshop or make a specialty therein of the sale of pearls." Deakin claimed that Sandberg had made a specialty of selling pearls, that the common lessor had done nothing to stop him, and that for that reason Deakin had moved out. The lower court held that by incorporating the above stipulation in the lease to Sandberg the lessor had performed all the obligations imposed upon it by the lease to Deakin. The Supreme Court held that to be error, that there was an obligation imposed upon the lessor to stop the second lessee from making a specialty of selling pearls. The court refers to *Lucenthe* v. *Davis,* 101 Md. 526, 61 Atl. 622, where the rule adopted by the lower court was laid down and refuses to follow same. To the same effect as the case last cited is *Ashby* v. *Wilson,* (1900) 1 Ch. 66, where the court quoting from *Kemp* v. *Bird,* 5 Ch. D. 978, said, "'I know of no authority for saying that under such circumstances as these'—and for my purpose I think the circumstances here are sufficiently similar—'a landlord is a trustee for his tenant in the sense that he must, at the request of the lessee, enforce a covenant against another lessee.'" R. W. A.

SUPPORTING WITNESS BY EVIDENCE OF GENERAL REPUTATION FOR VERACITY. —Under what circumstances a witness may be supported by testimony as to his general reputation for veracity is a question which has been, in its various aspects, one of much difficulty. A recent case presents some of its most interesting features. *McCue* v. *State,* 170 S. W. 280 (Tex. Crim. App., 1914). On behalf of the defendant, in order to prove an alibi, members of his

family, including his parents and his sister, testified that he was ill at home when the crime was committed. These witnesses were strangers in the county. The state introduced a large number of witnesses to contradict and destroy the alibi. The county attorney subjected the defendant's witnesses, in the language of the bill of exceptions, "to as thorough cross-examination as he could possibly give." It was held by the majority of the court that the trial court committed no error in refusing to permit these witnesses to be supported by the testimony of several of their neighbors as to their "good reputation for truth and veracity." The court said that proof of the general reputation of witnesses for truth and veracity is not admissable where no attack has been made on the witnesses and there is merely a conflict in the evidence; and, while it is recognized that "there has been a slight limitation placed on this general rule in this state, where the witness is a stranger in the county where he testified and this is, where the witness 'is assailed on cross-examination by questions attacking his credibility and tending to bring him into disrepute before the jury, he may be sustained by proof of his general reputation for truth and veracity,'" yet, it is pointed out, "in this bill there is no allegation that the witnesses or either of them was subjected to a cross-examination which *tended to discredit the witness,* the only allegation being that the county attorney 'cross-examined the witness as thoroughly and rigidly as he could'." In his dissenting opinion, Mr. Justice DAVIDSON apparently goes behind the mere allegation in the bill of exceptions and thus characterizes the nature of the cross-examination: "During the investigation of these witnesses by the state, counsel gave them a very rigid cross-examination, and sought by every means possible that were in his power as an astute lawyer to break down this testimony and show it to be false. He attacked them on account of being related to him, interested in the case, interested on account of the boy's welfare at the hands of the jury, and all those things were displayed in the cross-examination, intimating through the testimony that these things warped their judgment and their truthfulness beyond the verge into falsehood." This opinion refers to the fact that the witnesses were strangers and apparently goes on the theory that the case is within the limitation mentioned in the majority opinion, and that the cross-examination tended to discredit the witnesses.

The general rule is that a witness may be supported by testimony as to his general reputation for truth and veracity only where his general character has been first attacked, since the law gives him, prima facie, a good character; it is not sufficient merely that his testimony has been contradicted. *First National Bank* v. *Blakeman,* 19 Okla. 106, 12 L. R. A. (N. S.) 364; *Tedens* v. *Schumers,* 112 Ill. 263; *Funderberg* v. *State,* 100 Ala. 36; *Anderson* v. *Southern Ry. Co.,* 107 Ga. 500; *National Bank* v. *Assurance Co.,* 33 Or. 43. There would seem to be no authority in Texas beyond a dictum in *Harris* v. *State,* 45 S. W. 714, that such support will be permitted merely on the ground that the witness is a stranger and the testimony conflicting, and this doctrine finds support in but one state. See *Merriam* v. *Hartford etc. R. Co.,* 20 Conn. 354; though the doctrine of this case is probably limited to non-residents of

the state, *State* v. *Ward*, 49 Conn. 429. The Connecticut rule is expressly repudiated in the present case. The Texas doctrine as stated in the majority opinion is supported by the cases in that state. *Murphy* v. *State*, 40 S. W. 978; *T. & P. Ry. Co. v. Raney*, 86 Tex. 366, 25 S. W. 18; *Harris* v. *State*, 49 Tex. Cr. R. 339, 94 S. W. 228; *Phillips* v. *State*, 19 Tex. App. 164. But this rule that one who is discredited on cross-examination may be supported is not usually confined to strangers. *People* v. *Hulse*, 3 Hill 309; *Wick* v. *Baldwin*, 51 Oh. St. 51; *Warfield* v. *R. R. Co.*, 104 Tenn. 74. And there would seem to be no valid reason in any case for making a discrimination in favor of a stranger.

If the court in the principal case went beyond the mere allegation in the bill of exceptions as to the thoroughness of the cross-examination, and considered the nature of that cross-examination as shown in the dissenting opinion, it is doubtful if the ruling of the court was correct, within the principle of its own doctrine. The facts brought out on cross-examination tended to show bias on the part of the witnesses, by reason of their being closely related to the defendant. An eminent writer has treated bias as a species of "emotional incapacity" and has stated that it does not involve any issue on the moral character of the witness, hence there is no occasion for testimony to good character. 2 WIGMORE, EVIDENCE, §§ 940, 1107. No doubt this is true where the bias is such as merely to argue a tendency to lean unconsciously to one side of the truth. A witness may have such a tendency, yet be of unexceptionable character in regard to veracity. But where the testimony of such witness is so diametrically opposed to other testimony that, if the latter testimony be believed, the conclusion must be that the first witness knowingly falsified, in such case any imputation cast upon him by reference to his relationship with the accused must necessarily impugn his character for veracity. In the principal case, the members of the defendant's family, in testifying to an alibi, must have been guilty, if their testimony was not true, not simply of unconscious prejudice in favor of defendant, but of deliberate and unqualified perjury; and in such case, the effect of their cross-examination as to their relationship with the defendant and the intimations of the cross-examiner that "these things warped their judgment and their truthfulness beyond the verge into falsehood" must have been to impugn their general character for veracity and thus impair their credit before the jury. To bring forward witnesses to support their character would seem to be plainly relevant as tending to show that, in spite of their relationship they were beyond giving themselves to deliberate perjury. The insinuation of falsehood from the fact of being related to defendant is not analogous to admitted or proved facts of misconduct by the witness, and the situation is therefore not open to the objection sometimes urged against supporting witnesses shown to have been guilty of specific acts of misconduct, by evidence of general reputation for veracity. See *Dodd* v. *Norris*, 3 Camp. 519; *McCarthy* v. *Leary*, 118 Mass. 509; *Hitchcock* v. *Moore*, 70 Mich. 112; 2 WIGMORE, EVIDENCE, § 1106. The distinction between the two cases is the difference between permitting evidence of general reputation for veracity to be intro-

duced to support a witness conclusively shown to have been guilty of specific acts of misconduct, and permitting such evidence in support of a witness whose credit has very probably been impaired in the minds of the jury by emphasis on a relationship in itself innocent. H. C. B.

THE RIGHT OF MUNICIPALITIES TO MAKE BACK CHARGES A LIEN UPON THE PROPERTY TO WHICH WATER IS FURNISHED. A city ordinance provided that all water rates should be a charge against the property on which the water was furnished, and against the owner thereof. A failure to pay such rates was to be followed by turning off the water, and in no case was the water to be turned on again until arrearages had been paid in full. It was further provided that no change in ownership or occupation should in any manner affect the operation of this section of the ordinance. There was no express statutory power conferred upon the municipality to enact an ordinance of this specific character, nor was there any provision in the city charter conferring this power. The demandant petitioned to have water turned on at his premises against which there was a back charge of $1.50 incurred by a previous owner. He offered to comply with all the conditions precedent to turning on water except that of paying the said arrearage. Upon refusal by the municipality he applied for a writ of mandate, which was refused by the lower court; he appealed, and the judgment was reversed and remanded by the Court of Appeals in *Nourse* v. *City of Los Angeles,* (Cal. App.) 143 Pac. 801.

The problem presented by this case is merely a particular phase of the larger problem of the right of those who operate public utilities to make rules and regulations for the conduct of their business. Although the respondent in this case was a municipality, still a distinction must be made between a city as an agent of the state acting in its public capacity and a city acting in respect to its property in a private capacity, *Cincinnati* v. *Cameron,* 33 Oh. St. 336, 367. It acts in such private capacity when it engages in the business of supplying its citizens with water or gas, *St. Louis Brewing Co.* v. *City of St. Louis,* 140 Mo. 419. It would undoubtedly have the right to regulate the conduct of its business of this sort by ordinance, but when such an ordinance is to be derived under its implied, and not under express authority, it must meet the requirements of being reasonable, *Ex parte Green,* 94 Cal. 387. In view of these considerations, it is apparent that from this particular point of view a municipality is in no more favorable situation than a public utility company privately owned, and that the cases involving the reasonableness of the regulations of such private companies are entirely applicable when the regulations of municipally owned public utilities are concerned. A resort to these is, therefore, a legitimate proceeding in this connection.

On the question as to the right to make the payment of arrearages a condition precedent to the furnishing of water there is an irreconcilable conflict of authority; see WYMAN, PUBLIC SERVICE CORPORATIONS, § 451. In any discussion of this problem an analysis of the various circumstances under which the question arises is almost indispensable for the sake of clearness. The